3-16

In The

APR 26 1974

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

Term 1974

No. 73-1618

WILLIAM J. DAVENPORT,

Petitioner,

vs.

BENJAMIN ALTMAN, DANIEL W. JOY, HARRY MICHELSON, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM J. DAVENPORT
Petitioner, Pro se
324 Allaire Avenue
Leonia, New Jersey 07605
(201) 944-1174

(7091) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 New York, N.Y. (212) 565-6377 Philadelphia, Pa. (215) 563-5587 Washington, D.C. (202) 783-7288

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To The Chief Justice and the Associate Justices of the Supreme Court of the United States of America.

Your petitioner, William J. Davenport, pro se, seeks to be charged with a lawful bill of particulars and heard in his own defense as provided by the statutes, that lawful resolution of ten years of injurious controversy and harassment may be justly concluded. The respondent New York City Rent Control Administrators and their attorneys, maintain with force of law, their orders which are without statutory authority, without statement or showing of lawful cause and they deny and obstruct petitioner's constant quest for cause while those orders

deprive petitioner of his privately owned real property by procedures of applied law in which respondents participate and petitioner is held to criminal penalties.

In the instant complaint, petitioner charged respondents with averring to the courts, fraudulent claims of statutory requirement, original fact and prior administrative and judicial procedures and determinations while simultaneously concealing from petitioner the involved public records in prior and present litigation for the purpose of obliterating or manipulating judgment. The record of litigation hereto involved, has been dismissal without examination of the records or witness and without trial, the courts premising dismissal upon the claims of respondents herein charged fraudulent. The dismissal of the district court, affirmed without opinion, was initiated on a motion of the court after pre-trial conference and issued without hearing on the day the judge departed on vacation, there was no available rehearing. The judgment itself *cites and reverses* this Supreme Court's opinion. *Bowles v. Willingham*, 321 U.S. 503, 519-520. This court specifies that "hearings are required as per the statutes, delay is not denial." The district court in error as to fact adds to error with misconstruction to state "in rent control cases no hearing is required" (even though statutorily so required). The district court with reference to the Supplemental Report of Magistrate Schrieber (13a)* reversed the magistrate's finding that jurisdiction resides in the federal courts in accordance with U.S.C. Title 42, Section 1983(3) citing *Lynch v. Household Finance Corp.*,

* Numbers in parentheses ("a") refer to Appendix.

40 U.S.L.W. 4335 and *Harold McClendon, et al. v. Thomas E. Rosetti*, No. 71-1890 (2d Cir., April 12, 1972) by stating "absent federal question." The district court judgment totally ignores petitioner's charge of fraud and jurisdictional question under F.R.C.P. 59(a) and 60(b) which provides for examination and relief from judgment where fraud can be shown to have caused that prior judgment, to state res judicata of the prior judgment.

The judgment of U.S.D.J. Murray I. Gurfein, dismissing the complaint (71 Civ. 4263) was signed July 31, 1973 (1a). The appeal was before the Hon. Justices Kaufman, Feinberg and Mulligan and affirmation was entered March 5, 1974.

There appears to be bias of the second district and second circuit involved and unstated in the judicial posture derived from a disinclination to involve these federal courts in the "large and messy" situation of New York City Rent Control controversies. Petitioner however has no facilities for entering a properly constructed class action.

JURISIDICTION

Jurisdiction is original to this highest court due to the contrary district citation of this high court's opinion which in effect and fact reverse this high court's finding in *Bowles v. Willingham*, 321 U.S. 503, 519-520 (1943), and the affirmation of the second district after being informed. The exact page cited of this court's opinion states that hearings are required prior to administrative orders where so indicated in the statutes involved, as in the instant action, but that delay otherwise is not a denial of due

process. The interpretation placed thereupon by the district court is that "no hearings are required in rent control cases." (The district court thereto states prior opportunity to answer charges in writing. Of record there are no such charges and thus no such opportunity. The respondents' claims are part of the fraud petitioner seeks to expose.)

Jurisdiction is further original to these federal courts in accordance with U.S.C. Title 28, Sections 1331, 1332 and 1343; Title 42, Section 1983(3) and in accordance with F.R.C.P. 59(a) and 60(b) with adverse party fraud charged to respondents' attorneys and respondents in prior litigation. Res judicata by the rules thereto does not have application.

Jurisdiction further derives from grounds of statutory law provided by the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution and further secured by the New York State rent control statutes claimed as respondents' authority; specifically N.Y.S. 1961 Chapter 337, Section 4(4)(e) which makes mandatory the pre-orders hearing as previously stated by this high court (*Bowles v. Willingham*, p. 520) and N.Y.S. 1962 Chapter 21, Section 10(a) which prohibits the claimed administrative action requiring instead judicial proceedings which were not granted. The New York State Supreme Court has denied petitioner recognition of his claims.

Jurisdiction is stated to reside in these federal courts in Magistrate Schrieber's supplemental report to district court judge Hon. Murray I. Gurfein in the statement on p. 14a

The citing thereof of the district court is in contradiction and in gross error.

> "... March 23, 1972, when the High Court held 'unequivocally that rights in property are basic civil rights within Sec. 1343(3), *Lynch v. Household Finance Corp.*, 40 U.S.L.W. 4335.' *Harold McClendon, et al. v. Thomas E. Rosetti*, (2d Cir. No 71-1890, April 12, 1972)."

QUESTIONS BEFORE THIS COURT

Elementally the unpleasant question before this court is whether the New York City Rent Administrator, through his attorneys, is the sole arbitor, without supervision, of petitioner's lawful property rights as governed by New York City Rent Control and whether thereat they may direct or misdirect the court by any claims including frauds which they may chose to contradictorily present at any given moment. The answer is obviously not, thus the question arriving is whether there has been originally a statement of the issues and a reality of proceedings to determine fact, or conversely whether respondent and his attorneys have perpetrated and continue to maintain a fraud upon the courts. Thereto questions necessarily challenging district court judicial procedure of arriving at its judgment are:

1. Did the district court correctly cite, or reverse, the opinion of this court in *Bowles v. Willingham* and is petitioner thereto entitled as a matter of right to be heard: or; what is the requirement of law and has it in fact been met?

2. Has petitioner presented a federal question not subject to res judicata?

3. Has the burden of proof for unstated charges of respondent been properly placed upon petitioner?

4. Had respondent ab initio lawful authority and lawful cause for the orders underlying this litigation?

5. Is there lawful justification for the exercise of New York City Rent Control Authority as here demonstrated?

THE FACTS

The first fact of this litigation is that it is not repetition of prior litigation. Of necessity, petitioner entered original litigation (*Davenport v. Berman*, 68 Civ. 4984) which was dismissed and dismissal affirmed on grounds of insufficient showing of federal jurisdiction. A replacement action (*Davenport v. City Rent etc.*, 70 Civ. 1011) was re-instituted but dismissed upon respondents' claim of res judicata (petitioner's attempted defense, U.S. Oct. 1970 No. 1149, failed: he is pro se and not acquainted with the procedures of litigation). Petitioner still seeking judicial relief, as provided properly by the statutes, having sought unsuccessfully to restore the prior actions to the court calendar, now enters the court in accordance with provisions of F.R.C.P. 59(a) and 60(b) charging and seeking to demonstrate a fraud perpetrated by adverse party attorneys in the prior actions, where petitioner was simultaneously denied access to the administrative files or so-called "records" of reference in

the litigation by respondent and the courts themselves and thereto could not argue the facts of record. (This court is referred to petitioner's Petition for Writ of Certiorari, Oct. Term 1970, No. 1149.)

The second fact of the litigation is that it is proceeded by no examination of any questions or issues to determine the facts underlying the series of litigations, either administratively or judicially. Every averment and allegation of respondent is derived from a series of administrative claims advanced originally by an attorney before the court or an administrative document dated December 16, 1965. Neither of which has ever been opened for examination and both of which are false in essential claims as to statutory provisions, administrative authority, administrative proceedings, and claims of determined facts upon unstated and non-existent questions.

Precedent to the issues are police authority of government rent control laws, whose purpose is to maintain parity of the economic sectors retained from World War II, administered in New York between 1949 and May 2, 1962 by a New York State commission and since that date by a New York City agency (whose name has changed several times). The mandates of such police authority include a forti fiori limitation in the exercise of the police authority which is well stated in this court's decision *Bowles v. Willingham*, (1943). (However, respondent claims per curiam subsequent lower court authority to supersede the previously stated limitations.)

Petitioner acted under New York State Commission regulation between 1955 and 1961 inclusive in accordance with N.Y.S. Rent Control Law of 1954, Sec. 2(2)(h) which provided *statutory exemption* of apartments owner-occupied for a period of one year. The new New York City Rent Control agency in 1963-1965 *administratively* issued orders stating *revocation* of four such exemptions. The authority, subsequently claimed, was ex-post facto New York City Regulations of 1962 applied with retro effect. The agency claims "virtually plenary authority . . . in all respects . . . to do anything which the State Rent control authorities *might have done* prior to May 1, 1962, *and to supersede* any rules, regulations, orders, determinations and decisions of the *State Rent control authorities.*" (Reference hereto including legislated law.)

The original issue of litigation involves those administrative New York City rent control agency orders which seek to revoke the existent statutory exemptions, which had the prior acceptance and approval of the State Commission. The original provision of law is N.Y.S. Rent Control Law of 1954, Sec. 2(2)(h):

> "Housing accommodations which are rented after April 1, 1953 and have been continuously occupied by the owner thereof for a period of one year prior to the date of renting; provided, however, that this paragraph shall not apply where the owner acquired possession of the housing accommodations after the issuance of a certificate of eviction pursuant to the Rent and Eviction Regulations within the two year period

> immediately preceding the date of such renting, and provided further that this exemption shall remain effective only so long as the housing accommodations are not rented for other than single family occupancy."

Subsequently, of slight discussion is the section of law of reference by respondent which replaced the foregoing. The New York City Regulation is 2f(11) which almost equivalent to the foregoing, includes a restriction that only one exemption shall be so granted and alters the rented, for single family occupancy, to occupied, in single family occupany.

The lawful requirement of concern in the above are: (1) owner occupancy, not necessarily residency, for at least one year and (2) rerental not before two years after the issuance of a certificate of eviction, for single family occupancy.

Originally petitioner filed official forms entitled "Landlord's Report on Statutory Decontrol" for four apartments with the New York State Commission, which were accepted, examined, approved and the files closed and warehoused as State of New York Temporary State Housing Rent Commission dockets according to the following schedule.

Apt.	Docket	Filed	Closed
1	DR-3974	October 15, 1957	November 27, 1957
6	DR-5420	January 6, 1959	January 9, 1959

5	DR-6643	January 5, 1960	January 28, 1960
2	DR-7855	December 2, 1960	January 3, 1961

In 1963-64 the new New York City Administrators ordered these files opened for review and subsequently claim "to have treated them as applications", assigned new docket numbers 2AD 2248-52, claim them to have been "unadjudicated" and claim to have adjudicated these "new applications" and to have (alternately) rejected, denied, or revoked them.

Petitioner has not been able to effect a judicial hearing on the merits or the question, however the New York State Supreme Court, Appellate Division, First Department, has dealt with the question in *Baldwin v. Chang*, N.Y.L.J. July 23, 1973, p. 2, col. 1 with reference to the State Rent Administrator's advisory Bulletin No. 1, par. 13. Report of Statutory Decontrol provides:

> "... an application for decontrol is not required ....
>
> Section 2f(11) of the Rent Regulations provides for decontrol of a housing accommodation where it has been owner occupied for at least one year. The section is self-operative without further action by the Rent Commission.... There is no statute, rule or regulation that gives the Rent Commission jurisdiction to make such determination as a condition precedent to decontrol. Absent such jurisdiction its order is a nullity."

The lawfully required administrative proceedings are specified by three provisions, at least, of the New York State Rent Control Laws, as hereunder indicated;

N.Y.S. 1961, Chapter 337, Section 4(4)(e):

> "Before ordering any adjustment in maximum rents, a reasonable opportunity to be heard thereon shall be accorded the tenant and the landlord."

N.Y.S. 1961, Chapter 337, Section 4(8):

> "The powers granted in this section shall not be used or made to operate to compel changes in established rental practices, except where such action is affirmatively found by the commission to be necessary to prevent circumvention or evasion of any regulation, order or requirements under this act."

N.Y.S. 1962, Chapter 21, Section 10(a):

> "Whenever in the judgment of the city housing rent agency any person . . . engage in any . . . practices which constitute . . . violation of any provision . . . the city housing rent agency may make application to the Supreme Court for an order enjoining . . . to correct the violation, and upon a showing by the city housing rent agency . . . order shall be granted without bond. . . ."

Petitioner's charge in the complaint to the district court (p. 9, sub-paragraph I) was that respondent stated no questions or charges, presented no bill of particulars or

held no hearing to determine the facts prior to the issuance of orders. There is an absence now of record of any original charges, or any original determinations of fact, either before or after the administrative orders. Further the evidence of record is that there were no administrative proceedings to determine fact, there is no signatory officer or document of found or determined fact.

Therefore, of record, there are no lawful charges, there were no lawful proceedings to determine fact, there is no lawful cause which supports the contested administrative orders which were issued December *11, 1964.*

Petitioner, through his attorney sought review proceedings during 1955. The administrative "Progress Sheet" (Exhibit R, 44a) shows the absence of review, which petitioner charges, and which respondent attorney's averment contradicts. There was no administrative review, however a first document of administrative reasoning was issued December 16, *1965*, for the orders issued December 11, *1964.* (Reference is made to respondents' supporting statement in supplemental answers to interrogatory dated September 21, 1972, final sentence of subparagraph I (31a).) The document itself is rubber-stamped with the Rent Administrator's signature and the certifying signature is illegible.

The administrative reasoning set forth in that document as justification of the administrative orders is as follows:

It is claimed the Apartments 1, 2 and 6 at a time of inspection were "occupied for other than single family occupancy. Such occupancy in contravention of the Rent

Regulations mandates the recontrol . . . regardless of other factors which may or may not be consistent with the landlord's alleged right to decontrol thereof."

Petitioner is not playing games when he points out that no such charge is actually made. Further it is denied by respondents (Answers to Interrogatory, July 24, 1972, Answer No. 12, 42a) " . . . no claim was made that plaintiff landlord rented any apartment for other than single family occupancy . . . ." Further the inspector's report is false. No such occupancy existed, much less it's being charged to petitioner.

Although the dismissal judgment of the New York State Supreme Court to petitioner's Article 78 proceeding was in part based upon presumption of occupancy as an infraction of lawful specifications charged to petitioner. The fact of record is that it is not charged and the statutory provision shows no such requirement. The procedures of the court did not provide petitioner with a hearing that the question could have been examined and resolved.

Further it is claimed by respondents that somehow petitioner's occupancy time was insufficient. The provision of law aforestated is a one-year requirement. Respondent concurs that petitioner resided in the subject four apartments consecutively for a period exceeding six years and two months.

Respondents' document of December 16, 1965 states:

> " 'Apartment No. 1 the rejection . . . based . . . occupied for a period of less than *two* years . . . .

> Apartment No. 6 . . . (Overlapping periods of utility services noted above re: Apartments 1 and 5).
>
> Note: no insufficiency is actually shown to exist, the ConEd service overlap time supports petitioner's claims. The statement appears to be for confusion where the respondent recognizes his own error.
>
> Apt. No. 5. The record shows that as far as Apartment No. 5 is concerned the landlord appears to have had possession thereof and further appears to have shown occupancy thereof for the prescribed period of time. However, Administrator . . .opinion . . . .
>
> Apt. No. 2. Landlord claims to have occupied Apartment No. 2 from December 1, 1959 to December 1, 1960, while the record shows that it was only on January 7, 1960 that a utility account was opened in his name for the subject apartment."

In the foregoing administrative statement no infraction or insufficiency of time is shown. Yet respondents' attorney's claim (Respondents' Memorandum, New York State Supreme Court):

> "Moreover, the evidence of record also indicates that the landlord deliberately engaged in a scheme to create only an appearance of residence in the subject apartments but never really lived there."

And, respondents' attorney claims in this action on appeal (Brief for Appellees p. 4, par. 2)

> "Factually, the administrative proceeding record showed . . . that Mr. Davenport had actually resided in each of these apartments only a short time (less than a year in each case) . . . ."

Of the foregoing, a two-year occupancy is not lawfully required. Examination before the court can show actually such an occupancy to have occurred within the definitions of law, the point is moot. Apartment No. 5 is recognized by respondent administrators as having been occupied according to the provision of law. Yet the administrative respondents deny the statutory performance of law claiming as grounds some vague "Administrators' opinion." Apartment No. 6, no lack of occupancy is actually claimed, although it is implied. The showing lawfully required is absent and petitioner invites examination by the court, the facts support petitioner. Apartment No. 2 is simply charged to have "not had utility service billed to landlord for over a month." The charge itself is ludicrous, except for its serious misuse. Actually a question can be established for Apartment No. 2 and it can be answered. It has not been raised and thus is moot.

The administrative subterfuge of claims proves no explanation of petitioner's continuous occupancy of the four apartments for a period exceeding six years, but the administrative claim that the individual increments somehow add up to less than five.

Petitioner submits that the administrative claims might establish a question, but fail to effect a showing and are unlawful as cause.

Further essential information to this court regards prior litigation. The question being res judicata or a fraudulent claim of res judicata which involves prior examination of the issue. Thereto:

a. There was no statement of issue, bill of particulars, statement of charges, or procedures of examination effected by respondent New York City Rent Administrators either at the district level or the administrators' level. All of which is required but absent of record and thereto, there was no administrative determination of facts or statement of lawful cause.

Further, the claimed procedure, aside from not having in fact been effected, is contrary to the provisions of law and respondent has been so informed by the court, involved in the action of *Baldwin v. Chang*.

b. There was no examination of the records by the New York State Supreme Court, *Davenport v. Berman*, (June 29, 1966), references made by that court derive from respondents' averments. The court did not open the record for examination and argument, which is a matter of public record.

c. The original federal action, *Davenport v. Berman*, 68 Civ. 4984, as a matter of record, was denied entry as a matter of law, on appeal the

affirmation was specified on that ground. The further opinion of the district court derived from respondents' claims was excluded. Insufficiency of showing jurisdiction is not a positive bar of res judicata.

Further, the opinion of the court, which was contributory to dismissal was premised upon respondents' certification as to "previously determined fact, by the prior court", which averment was a fraud for the purpose of misleading the court.

d. The subsequent federal actions, all dismissed upon grounds of res judicata depended upon the court's acceptance of respondents' claims of prior judicial examination and determinations made before the federal court in *Davenport v. Berman*, 68 Civ. 4984, with reference to *Davenport v. Berman*,(629/66), June 29, 1966 of the New York State Supreme Court.

Respondent respectfully submits to this court, that the charge of complaint was fraudulent claims by respondent in these prior actions to obliterate and misdirect the court judgment. Respondent has not in prior or present litigation shown documentary proof to support his first allegation before the courts. The district court denying entry of the records for argument and examination or trial therewith prohibits the introduction of the records that the absences may be shown.

REASONS FOR GRANTING THE WRIT

I.

Of all questions directly or indirectly before the courts, the burden of proof has unlawfully been transferred from respondent to petitioner.

Respondent is an agent of government, to whom authority and responsibility for factfinding procedure has been assigned along with statutory specifications reinforcing the normal police authority mandates of law that such authority only be exercised with lawful cause and upon a showing of proof of the facts.

The entire history of litigation is petitioner's continual demand for that lawful cause, showing of proof and a charge that no such showing can be effected for the simple reason of absent lawful cause.

The entire precedent history of litigation is dismissal of the complaint by the courts without examination to verify the facts solely upon respondent attorneys' certification that cause and proof exist and have been shown.

The complaint hereto is that the certification is false.

Again the court dismisses the action on the basis of respondents' claim without procedure requiring or permitting examination to verify the fact.

Inherent in every judicial proceeding has been the court requirement that petitioner show cause for judicial relief, which itself is a reversal of the constitutional and

statutory mandate that respondent show cause for judicial approval.

Additionally, the record does show, that respondent has concealed the original documents of record from the original inception of administrative activity until one month before the filing of this instant complaint, which was eight years and covers the period of all prior litigation.

Thereto, the administrative grounds offered for this administrative attempt to revoke statutory exemptions is "... administrative ... finding ... of lack of credibility" (Answer to Question No. 7, 34a). In clear language respondent states the cause of eight years of litigation as his "disbelief" of petitioner's sworn statement.

II.

Every consideration of the district court judgment stated in the judgment is premised upon non-existent reality or reverses the evidence of documentary fact including a prior judgment of this United States Supreme Court.

The district court cites the opinion of this high court (*Bowles v. Willingham*, 521 U.S. 503, 519-520 (1943)) stating thereto exactly the reverse of this court's opinion as stated on the precise pages cited. This court stated a requirement of statutorily mandated hearings, permitting in other situations "delay ... is not denial ...." The district court adds error of fact to a belief that "in rent control cases" no hearing is required.

The district court cites (Supplemental Report of Magistrate Schrieber, 13a) to reverse it and state "absence of a federal question." The report cited instead states jurisdiction giving two examples:

"II

Before doing so, *a brief review* of my earlier recommendation that summary judgment be granted to the defendant in case No. 71 CIV 2205 *is dictated* by the recent opinion of the United States Supreme Court in *Lynch v. Household Finance Corp.*, 40 U.S.L.W. 4335 (U.S. Mar. 23, 1972). In this matter (motion No. 107 on the October 19, 1972 motion calendar) the Department of Rent and Housing Maintenance sought to intervene and to be named as a defendant in 71 Civ 2205, in which John V. Lindsay was sued as an individual. The defendants also sought summary judgment. The report recommended that intervention be permitted and summary judgment be granted, for the issue was fully litigated in prior court proceedings in both state and federal courts. The earlier report stated,

'Even if one were to assume that plaintiff could satisfy the jurisdictional requirements of either 28 U.S.C. 1331 or 1332 or of 28 U.S.C. 1343(3), he cannot overcome the *res judicata* and *collateral estoppel* barriers. See *Taylor v. New York City Transit Authority*, 433 F.2d 665 (1970).'

> Further, it was my opinion that plaintiff's reliance on Section 1983 of Title 42 fails because of the nature of his claim — as the matter in dispute involved property, not 'personal liberty.' This view of Section 1983 was the law of the Second Circuit Court of Appeals (*Eisen v. Eastman*, 421 F.2d 560, 1969) until March 23, 1972, when the High Court held 'unequivocally that rights in property are basic civil rights within Sec. 1343(d) *Lynch v. Household Finance Corp.*, 40 U.S.L.W. 4335', *Harold McLendon, et al. v. Thomas E. Rosetti*, (2d Cir. No. 71-1890, April 12, 1972).
>
> While *my earlier view* of plaintiff's 1983 claim *is now revised* in this new direction of the appellate courts . . . ."

The district court states res judicata with reference to prior judicial dismissal without examination or trial. The prior dismissal appealed did not elicit an appeal court acceptance of a res judicata opinion of the prior court, but stated "insufficient showing of federal jurisdiction." Further, the instant action is not the same petition for relief but is a new entry, premised upon adverse party fraud of prior litigation and entered in accordance with F.R.C.P. 59(a) and 60(b) which precludes the res judicata ruling to require examination of the issue by the court and offers relief from the prior judgment.

The district court therefore states no valid grounds for its judgment.

Further analysis of the opinion of the district court would disclose an apparent bias and prejudice of the district court, as indicated:

a. The opinion starts with a reference to plaintiff as a black landlord, which was not of discussion in the instant complaint, but a prejudicial derivation from the original federal complaint of res judicata reference. Petitioner's former attorney insistently entered these references and then failed to press the valid information and argument. The issue is not in contention, the point should be moot and the court's reference is prejudicial.

b. The court next mentions "to find that *because of rent control* it does not contribute to his living.", thereby stating the major unlawful effect of rent control in New York City. The court then shows an absolute absence of concern of inaction.

The Rand Corporation Report to the New York City Government in 1969-1970; The First National City Bank of New York Monthly Economic Letter of July 1969 and multiple magazine, newspaper and private and public statements of knowledgeable city officials indicate that of expert opinion the New York City Rent Control law contributes to the housing problem rather than effects its cure. As such the authority of law is exercised contrary to its mandate and is unlawful.

c. The court notes peitioner is *pro se*, stating "his circumstances merit a sympathetic hearing . . . ", in the order of dismissal which prevents just hearing of the "complaint and petition for the original hearing and determination of fact lawfully required as due process of law."

d. The court next refers to "bare facts" of controversy citing a preliminary hearing report of Magistrate Schrieber. Of record, Magistrate Schrieber was assigned hearing on a series of motions by the court. His original report was unrecognized by the court as not containing finding of fact and determination of law and a supplemental report was formulated, which could only state the existent judicial judgments as reference. The magistrate recognized no authority to supersede these prior judgments or hold trial.

Both reports failed to include the magistrate's discovery that previously no hearings had occurred either administratively or judicially on the alleged questions to determine the merits thereof. Of record are petitioners immediate objections, which the district court has not accorded recognition.

The court has used this report for a purpose contrary to its instruction of original intent, as a permanent rather than a temporary basis of judgment. And for that purpose the magistrate's hearing is a non-sequitur presenting as judgment of a fraud only the prior acceptance by the court as absolute proof of nothing.

e. The court refers to res judicata defense and its prior summary judgment in the action 71 Civ. 2205, the report and supplemental report of Magistrate Schrieber. The report was originally rejected by the court and is replaced by the supplemental report, which contrary to the court's statements *does* state petitioner jurisdiction of a federal court.

The court's reference to res judicata accepts a conjecture of the magistrate, which is presented in precisely that conjectural manner, as an absolute determination. By so doing the court totally ignores the issue of complaint which is adverse party fraud; and the F.R.C.P. 59(a) and 60(b) provisions without verification, examination, argument or trial.

f. The court states "plaintiff now contends . . .he was not granted a due process hearing before the determination by the City Rent Administration."

The court is in error, plaintiff-petitioner has made and continued this portion of his complaint in all administrative and judicial application. This complaint is grossly larger charging that petitioner has (1) not been charged with even a bill of particulars statement, (2) has had no notice of charges, (3) has had no procedures of determination, (4) that there exists no statement, finding or determination of lawful cause attached to him to justify respondents' orders, but (5) more specifically the issue of this complaint is adverse party fraud before the courts in prior litigation.

g. The court refers to magistrate's findings and the judicial confirmation of a non sequitur. The court correctly states "plaintiff was represented by counsel", the remainder of the statement of the court is in error. There were no proceedings and no charges therefore no opportunity to answer in any fashion.

The court's misinterpretation and reversal of this court's opinion, *Bowles v. Willingham* was already discussed.

h. The court refers to due process finding of Judge Cannella in 68 Civ. 4984. This prior judgment, derived from the charged adverse party fraud, which is the issue of the instant complaint was not upheld on those grounds in appeal. For the court to prejudice judgment on these grounds in contrary to judicial procedure dependent upon the court's major error of denying petitioner recognition of the issue of the complaint.

The court noting its own adversity to the grounds of affirmance then invokes failure to state a federal claim which is contrary to the court's stated acceptance of page 13a of Magistrate Schrieber's supplemental report.

i. The final large paragraph of the judgment page five is unbelievable intrusion of the court in defense of respondent, where respondent has admitted the most gross possible judicial atrocity, that respondent concealed the records from petitioner between 1963 and August, 1971. Full comprehension comes only with perspective view. In brief:

i. In discussion are the administrative files including the original New York State Commission docket sheets with the original notations of Commission approvals.

ii. The statutory responsibility of law places upon respondent the requirement for determining fact, requiring that he hold hearings, and/or submit charges for judicial hearing before the New York State Supreme Court, which hearing procedure requires presentment of the involved documents.

iii. Respondent admits administrative denial of hearings and the records disclose that the courts held no examination or hearings. The records and many sworn statements of petitioner state that petitioner has not had access or knowledge of these basic documents of the litigation evidence, which he sought repeatedly to obtain by subpoena, from the inception of administrative action through all litigation prior to the instant complaint.

iv. Respondent has continually claimed original administrative proceedings, notice to petitioner, opportunity of petitioner to answer the charges.

v. Petitioner has continually inquired of the courts and respondent, "What charges?".

vi. The courts have in every instance summarily dismissed petitioner upon his failure to show an adequate complaint.

vii. Petitioner, held responsible for management operation of the subject property under impossible conditions created by respondents' orders, has been subjected to secondary damage suits in law, to which he could offer not defense.

viii. As consequence of judgment obtained by his enforced default, the management finance failed, mortgage foreclosure began and in this directly resultant action (*United Mutual v. Wm. Davenport*, S.D.N.Y. 70 Civ. 3878) petitioner was finally able to successfully subpoena these "public" records for the first time in August 1971.

ix. Of the subpoenaed records, essential letters of correspondence are absent. The Con-Ed and Telephone Co. records which are stated crucial evidence by respondent are absent.

x. Admission of respondent comes only after interrogatory of petitioner and evasion by respondent and an order of the court to answer petitioner's question. The question is not answered in a straight-forward manner, but in a confusing mode of evasiveness. But as the answer to the question, it is admission that the first known access was August 1971.

xi. Throughout the interrogatory, essential questions as to notice are interspersed. The answers and documentary submissions thereto are fraud, now documentary in the record and in the custody of the court.

xii. Respondent's admission proves the fraud of every prior administrative claim.

xiii. It is unbelievable but, at this point the court interjects judicial defense. Where respondent is lawfully required to prove his prior compliance with lawful procedure, the court rejecting the requirements of F.R.C.P. 11 and 33 for positive answers accepts discussion of attorneys of the involved parties wherein respondents refused the statutorily required hearing which petitioner's attorney demanded *ab initio* as a satisfactory substitute for compliance with the requirements of notice to petitioner with access to the information.

xiv. The final hope of the court that respondent will substitute his examination for that which the court denies, derives from the court's recognition that petitioner has a just cause of complaint. I submit that it is unjust and unlawful for the district court to so simply seek to not be involved. The hope is forlorn expression after ten years of contention between the parties where no examination has been effected because respondent has fought tooth and nail to prevent it.

III.

Of statute and of record there is no authority and no lawful grounds or cause for respondents' ab initio orders. Respondents' position, posture and presentments in this action are fraud.

Of record, respondent did not originally examine an application as he seeks to claim. Respondent did open and review and reject prior administrative dockets of statutory exemption while denying petitioner access to proceedings or administrative process by which he might discover the questions of administrative concern and/or speak thereto in his own defense. Which actions deny, are contrary to, and contravene the statutory and constitutional mandates of the First, Fourth and Fifth Amendments and the Rent Control Laws of the State of New York [1961 Chapter 337, Section 4(4)(e) and 1962 Chapter 21, Section 10(a)].

Further authority of the New York Supreme Court and the supersedent New York State Rent Administrator as stated in judgment (*Baldwin v. Chang*, N.Y.L.J. July 23, 1973, p. 2, col. 1) is:

> " . . .There is no statute, rule or regulation that gives the Rent Commission jurisdiction to make such determination as a condition precedent to decontrol. Absent such jurisdiction its order is a nullity."

True, but denied examination is petitioner's claim that there is of record no bill of particulars advanced during the

ten years of contention hereto which states a single infraction or infringement upon any specification shown of the statutes which is therewith shown attached to petitioner. There are a series of opinions, interpretations and conjectures by respondents which may be grounds of a question. The questions themselves are not formulated and the totality of respondents' presentments to the court contradict that fact and are fraud.

> "An attempted action of a public body without power is void and may be attacked for want of jurisdiction at any time when an attempt is made to enforce claims founded on such action."

The statement above is a quotation of the court (*People ex rel. N.Y. Central R. & Co. v. Lindburg*, 283 N.Y. 344, *Matter of Long Island R.R. Co. v. Hylan*, 240 N.Y. 208). It follows that appellant seeking to invoke his rights to useage and management of his personally-owned real property and obstructed and denied access to the procedures of law by appellee's existent orders is entitled to the protection of this court of his civil rights.

Further respondent fails to present documentation of lawful proceedings, which is petitioner's averment and of record, no such proceedings have existed Respondents' claims to such proceedings to examine the absent question and determine merit thereto is unsubstantiated fraud.

Of record, allegations by respondent attorneys of determined fact, are contrary to administrative opinion, unsubstantiated by evidence of record and are false.

IV.

Serious injury caused to petitioner by respondents' orders without lawful cause are a manifest injustice which cannot be tolerated under color of law.

The involvement of rent controls generally, are an economic control under the welfare and police authority of a sovereign state which are otherwise constitutionally prohibited as an infringement upon the civil rights of the people. The action of respondents and their predecessors here unless in accord with the purpose, mandates of statutory securities and consistent with true fact are unlawful under color of law and either must be prohibited and where they have occurred must be rectified; or must inevitably disintegrate lawful process and the public welfare. The effect is the diametric reverse of their lawful purpose and itself makes the administration's actions unlawful.

Evidence of the failure of the rent controls in the City of New York are common discussion in the public press, the legislative corridors and the administrative reports as well and of gross visibility in the public streets as block upon block of destroyed housing.

In the instant litigation, petitioner's property in 1963-1964, at the inception of the administrative action, was fully tenanted and violation-free. Today, as a consequence of the administrative orders and absence of resolution to the questions and problems engendered, the same building is in foreclosure procedure and untenantable, and even though housing facilities are so badly needed, unlivable.

Respondent, by creating an insoluble block to lawful procedure and necessary economics has forced petitioner's loss of tens of thousands of dollars and years of work, and by the same circumstance deprived the public of badly-needed housing.

The records cannot show lawful authority, lawful cause, or lawful proceedings to provide just grounds for the underlying administrative orders.

The prior and present claims of respondents' attorneys are not supported by the evidence of record, by the statutes, or the original administrative statements. Thereto the courts have permitted a fraud to manipulate judgments.

It is obvious that a serious wrong has herein been effected under color of law.

The situation being applied to the hundred thousand small New York City property owners deserves and requires examination. The proliferation of rent controls to other areas besides New York City points out the urgency of need. The remaining question is cause, if not lawful then what?

Petitioner is enjoined by the rules of this court from entering deleterious comment in this document. However, it is public record that a few years ago the Hon. Adam C. Powell, congressional representative from New York City named one Ester James as a "bagwoman" or "graft collector" for New York City politicians. Thereto he was sued for libel with an attorney, Mr. Raymond Rubin,

acting for Mrs. James. It is also public record that preceding the issuance of Rent Administration orders in the instant situation, petitioner was denied access to officials or information, while Mr. Rubin acted, representing one of petitioner's tenants, filing suit for triple damage for overcharges in rent related to Apartment No. 1, prior to the issuance of that administrative order. Correspondence between Mr. Rubin and administrative officials of reference in documents is absent from the files. Logic indicates that Mr. Rubin had advance knowledge of the intended administrative orders. The court is reminded at this point, that while the law required one year or occupancy and while the administrative record acknowledges at least seventeen months of owner residence, the administrative order seeks to revoke the statutory exemption stating "occupancy other than single family" without showing proof or stating attachment, and claiming a *two* year occupancy requirement. The order stating no lawful grounds gave rise to the tenancy suit and damage judgment which placed the property in foreclosure. Tenants of Apartments No. 1 and 6 on the administrative claim that they are occupying the apartment other than as rental agreement of single family, has provided them grounds for damage suits against petitioner for injury of more than five thousand dollars.

It does appear that the authority of government and inert body of the courts are the instrument of criminal action against petitioner as a property owner. However, every legislative, administrative or judicial agent with responsible authority has now developed "precedential prior vested interest" in not correcting the performance of this malfunction of law. The only known independent authority without such a vested interest is this United States Supreme Court.

CONCLUSION

This court should grant certiorari on this petition to determine whether petitioner's averment of deterioration of lawful process at the citizens' functioning level is true. In determining from the records that these averments are true this court should exert its authority to restore the rights of the people to the people. In petitioner's situation, it should state the nullity of respondents' underlying orders, petitioner's statutory rights to be heard, and petitioner's lawful right of redress for the injury sustained.

Respectfully submitted,

s/ William J. Davenport
Petitioner, Pro se

PROVISIONS OF THE STATUTES

N.Y.S. Emergency Housing Rent Control Law amended 1954 Section 2(2)(h)

> "Housing accommodations which are rented after April 1, 1953 and have been continuously occupied by the owner thereof for a period of one year prior to the date of renting; provided, however, this paragraph shall not apply where the owner acquired possession of the housing accommodations after the issuance of a certificate of eviction pursuant to the Rent and Eviction Regulations within the two year period immediately preceding the date of such renting, and provided further that this exemption shall remain effective only so long as the housing accommodations are not rented for other than single family occupancy."

N.Y.S. Laws of 1961 Chapter 337 (Rent Control Law.) Section 4(4)(e)

> "Before ordering any adjustment in maximum rents, a reasonable opportunity to be heard thereon shall be accorded the tenant and the landlord."

N.Y.S. Laws of 1962 Chapter 21 (Rent Control Law.)

> "An act to provide for the establishment and administration of rent control within cities of one million or more, to repeal section twelve-a of the emergency housing rent control law, to provide for the use of nineteen hundred fifty four equalization rates in rent adjustment proceedings, ..."

N.Y.S. Laws of 1962 Chapter 21, Section 10(a)

> "Whenever in the judgment of the city housing rent agency any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of subdivision nine of this section, the city housing rent agency may make application to the Supreme Court for an order enjoining such acts or practices, for an order enforcing compliance with such provision, or for an order directing the landlord to correct the violation, and upon a showing by the city housing rent agency that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond. Jurisdiction shall not be deemed lacking in the Supreme Court because the defense is based upon an order of an inferior court.

N.Y.S. Laws of 1949 (Rent Control Law) Section 5(a)(18) provides:

> "a fair net operating income . . . in such amount as is necessary to bring the net operating income from the building (expressed as a percentage of annual income) to the median net operating income of landlords generally. This median is 30 percent of annual income in the case of buildings containing less than five dwelling units and 25 percent in the case of buildings containing five or more dwelling units."

APPENDIX A

JUDGMENT OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

WILLIAM J. DAVENPORT,

Plaintiff,

-against-

BENJAMIN ALTMAN, et al,

Defendants.

GURFEIN, D. J.

The plaintiff is a black landlord who apparently invested his life savings in buying an eight unit apartment house in the Bronx only to find that because of rent control it does not contribute to his living. He appears *pro se*, and his circumstances merit a sympathetic hearing, keeping in mind the rights of his tenants. His charges of racial discrimination have been dismissed earlier.

The bare facts of his continuing controversy with the City Rent Administration are well told in findings of fact made by Magistrate Schreiber when he made a supplemental report on five motions referred by me and a sixth motion referred by Judge Bonsal:

Judgment

"FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Plaintiff, a citizen of New Jersey, is the owner of an eight-unit apartment at 575 East 168th Street, Bronx, New York.

2. In September 1963, administrative proceedings were begun in the Bronx District Rent Office of the City Rent Administration to determine whether five decontrolled apartments in plaintiff's building were subject to the provisions of the New York City Rent Eviction and Rehabilitation Law.

3. During these proceedings, plaintiff was represented by counsel and was afforded the opportunity to answer the charges and present evidence in writing.

4. On December 11, 1964, the Bronx District Rent Director held that four of the five apartments in question did not qualify for statutory decontrol and were subject to the City rent control law.

5. Thereafter, plaintiff, by his counsel, filed an administrative appeal from this decision, which was denied by an order and opinion (docket No. CPLA 9638-9641, December 15, 1965).

6. Plaintiff's counsel then sought judicial review of the Rent Administrator's final

determination by Article 78 proceedings in the Supreme Court, New York County (Index No. 629/1966).

7. These proceedings were decided adversely to the plaintiff by Mr. Justice Carney (New York Law Journal, April 29,1966, p. 18 col. 1).

8. Plaintiff, by his counsel, appealed this ruling to New York Appellate Division — First Department, however, the lower court ruling was affirmed without opinion on March 9, 1967 (*Davenport v. Berman*, 27 A.D. 2d 903).

9. Plaintiff's counsel, followed this denial, by instituting a class action in this Court challenging the constitutional validity of the New York City Rent Control Law (*Davenport v. Berman*, et al. 68 Civ. 4984).

10. In an unpublished decision, filed July 25, 1969, Judge Cannella granted defendants' motion to dismiss the complaint. The Court also held that plaintiff's claim of a lack of due process with respect to the decontrol proceedings was without merit — the requirements of due process of law having been met by adequate proceedings and judicial review in the state court.

11. Judge Cannella's ruling was affirmed by the Second Circuit Court of Appeals (420 F.2d 294, 2d Cir. 1969).

Judgment

12. On March 13, 1970, plaintiff, appearing pro se, initiated his second federal action, seeking preliminary injunctive relief enjoining the enforcement of the orders of the city rent control authorities (*Davenport v. City Rent & Rehabilitation Administration and Mayor John V. Lindsay*, 70 Civ. 1011).

13. In an unpublished order and opinion filed May 11, 1970, Judge Tenney denied the plea for injunctive relief and dismissed the complaint. The Court found that the action was barred by the *res judicata* principle.

14. Plaintiff's appeal of this order was dismissed without opinion by the Second Circuit. (Docket No. 35002- 2d Cir. Sept. 24, 1970) and a motion for certiorari was denied by the United States Supreme Court, 401 U.S. 956, 91 Sup. Ct. 978.

15. On April 20, 1971, plaintiff, again appearing pro se, commenced his third action in this Court against the Governor of the State of New York (*Davenport v. Rockefeller*, 71 Civ. 1747).

16. This action was dismissed by an order of Judge Cannella, filed October 19, 1971. The Court held that plaintiff failed to state a claim upon which relief could be granted.

17. In May 1971, the plaintiff, in his pro se capacity, commenced his fourth federal action in this Court against John V. Lindsay, as an individual, seeking essentially the same relief as in the prior actions (71 Civ. 2205).

18. On September 30, 1971, plaintiff appearing pro se instituted his fifth and last federal action to date against the Rent Commissioner, the General Counsel for the Rent Control Office and the four families occupying the re-controlled apartments in his building seeking similar relief to that sought in his four prior actions (No. 71 Civ. 4263)."

Mr. Davenport has been defeated by the City's *res judicata* defense in the earlier actions and again when I granted summary judgment for the defendant in 71 Civ. 2205. I based that decision, in part, on the conclusion that the matter was *res judicata* (Report of Magistrate Schreiber, p. 10; Supplemental Report, p. 3).

The plaintiff now contends in this case that he was not granted a "due process" hearing before the determination by the City Rent Administration. But Magistrate Schreiber found and I confirmed that "[D]uring these proceedings, plaintiff was represented by counsel and afforded the opportunity to answer the charge and present evidence in writing" (Finding No. 3). That is, in any event, sufficient for due process in rent control cases. *Bowles v. Willingham*, 321 U.S. 503, 519-20 (1943).

Moreover, the "due process" claim was before Judge Cannella in 68 Civ. 4984 and he decided it adversely to the plaintiff. Even if the per curiam affirmance was on grounds of insufficiency of jurisdictional amount, 420 F.2d 294 (2 Cir. 1969), Judge Cannella's decision is law of the case. I agree with my learned brethren, Judge Cannella and Judge Tenney, and will dismiss the action on the alternative grounds of failure to state a federal claim and *res judicata.* The other pending motion to strike the defense of collateral estoppel and *res judicata* is, accordingly, denied.

Mr. Davenport is in error when he argues that Michelson's supplemental answers to interrogatories constitute admissions that Mr. Davenport was denied due process in the original proceedings before the Rent Administrator. The answers of Mr. Michelson, general counsel to the office of Rent Control, mean only that Mr. Davenport had access to the records *at least* as of August 1971. Moreover, Mr. Michelson expressly states at answer 4j that: "The entire file of docket 2 A.D. 2248-52 was available to Mr. Davenport's attorneys, and it either was or could have been examined by them when the proceeding was pending at the administrative level, and also in judicial review proceedings thereafter."

I hope the Rent Administrator will review Mr. Davenport's grievances again.

The complaint is dismissed.

M.I. Gurfein
U.S.D.J.

Dated: July 31, 1973.

APPENDIX B

AFFIRMANCE OF SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 345—September Term, 1969.

(Argued December 5, 1969 Decided December 29, 1969.)

Docket No. 34027

WILLIAM DAVENPORT,

Plaintiff-Appellant,

—against—

FREDERICK S. BERMAN, individually, and as Commissioner of Office of Rent Control, MARIE GAMBINO, individually, JOHN V. LINDSAY, MAYOR OF THE CITY OF NEW YORK, and COMMITTEE ON GENERAL WELFARE,

Defendants-Appellees.

Before:

WATERMAN, HAYS and FEINBERG,

Circuit Judges.

Appeal from denial of application for three-judge court and dismissal of complaint attacking New York City rent

control. Order of United States District Court for the Southern District of New York, John M. Cannella, *J.*, affirmed.

GENE CRESCENZI, New York, N. Y., *for Plaintiff-Appellant.*

WILLIAM E. ROSEN, New York, N. Y. (Daniel W. Joy, Acting General Counsel, Office of Rent Control, Department of Rent and Housing Maintenance, New York City Housing and Development Administration, on the brief), *for Defendants-Appellees Berman and Gambino.*

IRVING GENN, New York, N. Y. (J. Lee Rankin, Corporation Counsel, Stanley Buchsbaum, on the brief), *for Appellees Lindsay and Committee on General Welfare.*

PER CURIAM:

Challenging rent control in New York City,[1] plaintiff William Davenport brought suit against Frederick S. Berman, individually and as Commissioner of the New York City Office of Rent Control, John V. Lindsay, Mayor of the City

1 See New York City Rent and Rehabilitation Law, N. Y. C. Adm. Code, Ch. 51, Title Y, authorized by Local Emergency Housing Rent Control Law, N. Y. Unconsol. Laws §§8601-17 (McKinney Supp. 1969).

of New York, The Committee on General Welfare, and Marie Gambino.[2] The United States District Court for the Southern District of New York, John M. Cannella, *J.*, denied plaintiff's application for a three-judge court and dismissed the complaint. Davenport appeals and we affirm.

Appellant is a Negro landlord of a rent-controlled apartment house in the Bronx. The complaint and papers in opposition to defendants' motions to dismiss present a variety of theories, including the averment that plaintiff sues as a representative of both landlords and tenants. As best we can make out, the claims still pressed in this court are as follows: (1) Rent control deprives Negroes of the equal enjoyment and use of property because black tenants are thereby kept in inadequate housing and denied the opportunity to be charged higher rents which would maintain decent housing for them; this also discriminates against Negro landlords. (2) The procedures for decontrol of apartments violate due process and were applied discriminatorily against Negro landlords, including appellant. (3) Rent control forces appellant into involuntary servitude.

To the extent that the complaint and papers allege loss of money or property rights, absent racial discrimination, they gave the district court no sufficient basis for determining that plaintiff's claim met the jurisdictional minimum of

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2 We put to one side the inaccuracies in the papers; e.g., Marie Gambino is apparently the incorrect name for Josephine Gambino, a rent administration official.

either 28 U.S.C. §1331 or 28 U.S.C. §1332 and did not meet the requirements of 28 U.S.C. §1343(3). See *Eisen v. Eastman*, slip op. 621 (2d Cir. Nov. 28, 1969). While the claim of discrimination might be covered by 28 U.S.C. §1343 (3), mere conclusory statements that rent control furthers racial discrimination, without supporting facts, are not sufficient. *Powell* v. *Workmen's Compensation Board*, 327 F.2d 131, 137 (2d Cir. 1968). The claim of involuntary servitude is frivolous. *Marcus Brown Holding Co.* v. *Feldman*, 256 U.S. 170, 199 (1921).

Judgment affirmed.

APPENDIX C

MAGISTRATE SCHRIEBER'S SUPPLEMENTAL REPORT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIAM J. DAVENPORT,

Plaintiff,

-against- 71 Civ. 1747

NELSON A. ROCKEFELLER,
Governor of the State of New York,

Defendant.

Magistrate Schrieber's Supplemental Report

WILLIAM J. DAVENPORT,

Plaintiff,

-against- 71 Civ. 2205

JOHN V. LINDSAY, as an individual,

Defendant.

WILLIAM J. DAVENPORT,

Plaintiff,

-against- 71 Civ. 4263

BENJAMIN ALTMAN, etc.,

Defendants.

I.

On January 21, 1972, I issued a report and recommendations covering five motions referred by Judge Gurfein and a sixth motion referred by Judge Bonsal. All these motions dealt with the attempts by the plaintiff to overcome a 1964 order of the City Rent Administrator, which re-controlled four apartments in a house owned by the plaintiff.

The report recommended that three of the motions by the defendants, which sought to quash plaintiff's

subpoenas of September 2, 1971, September 28, 1971 and November 5, 1971, be denied as the matters were moot. The records sought by the plaintiff were produced for inspection and copying during a series of hearings on the motions and the issue was no longer a viable one.

A fourth motion by the plaintiff seeking a stay of proceedings in one of his three pending cases was, in my judgment, not justifiable.

In the fifth motion, the Department of Rent and Housing Maintenance sought permission to intervene in case No. 71 Civ 2205. In addition, defendants sought summary judgment. My recommendation was that the intervention and summary judgment relief be granted.

In the sixth motion in case 71 Civ 4263, plaintiff sought a preliminary injunction staying the Rent Commissioner from enforcing four re-control orders issued in December 1964. Relief of this nature had previously been sought by plaintiff in two earlier cases before this Court, and in each, Judge Tenney and Judge Cannella denied such relief. As the plaintiff failed to present any new facts which would warrant this Court to reconsider its prior rulings, it was recommended that the Court once more deny plaintiff's motion for a preliminary injunction.

Because the initial report and recommendations did not set forth specific findings of fact and conclusions of law, as called for by Rule 52(a) of the Federal Rules of Civil Procedure, the report was returned by Judge Gurfein on February 9, 1972 for further consideration.

Magistrate Schrieber's Supplemental Report

II.

Before doing so, a brief review of my earlier recommendation that summary judgment be granted to the defendants in case No. 71 Civ 2205 is dictated by the recent opinion of the United States Supreme Court in *Lynch v. Household Finance Corp.*, 40 U.S.L.W. 4335 (U.S. Mar. 23, 1972). In this matter (motion No. 107 on the October 19, 1972 motion calendar) the Department of Rent and Housing Maintenance sought to intervene and to be named as a defendant in 71 Civ 2205, in which John V. Lindsay was sued as an individual. The defendants also sought summary judgment. The report recommended that intervention be permitted and summary judgment be granted, for the issue was fully litigated in prior court proceedings in both state and federal courts. The earlier report stated,

> "Even if one were to assume that plaintiff could satisfy the jurisdictional requirements of either 28 U.S.C. 1331 or 1332 or of 28 U.S.C. 1343(3), he cannot overcome the *res judicata* and *collateral estoppel* barriers. See *Taylor v. New York City Transit Authroity*, 433 F.2d 665 (1970)."

Furthermore, it was my opinion that plaintiff's reliance on Section 1983 of Title 42 fails because of the nature of his claim — as the matter in dispute involved property, not "personal liberty". This view of Section 1983 was the law of the Second Circuit Court of Appeals (*Eisen v. Eastman*, 421 F.2d 560, 1969) until March 23,

1972, when the High Court held "unequivocally that rights in property are basic civil rights within Section 1343(3), *Lynch v. Household Finance Corp.*, 40 U.S.L.W. 4335". *Harold McClendon, et al. v. Thomas E. Rosetti* (2d Cir. No. 71-1890, April 12, 1972).

While my earlier view of plaintiff's 1983 claim is now revised by this new direction of the appellate courts, it is still my judgment that plaintiff cannot overcome the defenses *res judicata* and *collateral estoppel*, and summary judgment is in order.

III.

On the question of injunctive relief sought by the plaintiff, the first report recommended that it be denied, because no new facts were presented to warrant reversal of the earlier rulings of two judges of this Court which denied similar applications for the same relief. Furthermore, it was my judgment that on the record before the Court, there was little probability of plaintiff's success. The possible detriment to the public if the injunction is issued and is ultimately proved unwarranted outweighed the possible harm to plaintiff.

Whether a motion for a preliminary injunction should be granted or denied is ordinarily within the descretion of the trial court (*Garland v. Ruskin*, 249 F. Supp. 977 (S.D.N.Y. 1965), and,

> "There are, in this regard, four concepts which the court should take into consideration and balance

before granting this relief: the probability that plaintiff will eventually succeed on the merits; the presence of some irreparable injury to the plaintiff; the injury to defendant, and the public interest in the granting of the preliminary injunction" *Citizens Committee for Hudson Valley v. Volpe*, 297 F. Supp. 804 (S.D.N.Y. 1969).

See also *7 Moore's Federal Practice 2d Ed. Section 65.04; First — Citizens Bank & Trust Co. v. Camo*, 432 F.2d 481, (4th Cir. 1970); *Concord Fabrics, Inc. v. Marcus Brothers Textile Corp.*, 409 F.2d 1315, (2d Cir. 1969).

Even if it is assumed that plaintiff could make a showing of some injury, as to the other three factors, it is clear that the scales tip heavily in defendants' favor, for the probability that plaintiff could succeed is a remote one, at best. Furthermore the injury to the defendant (in this case the Rent Commission and the tenants residing in the four recontrolled apartments) in staying the enforcement of rent orders would cause considerable hardship. Therefore, this Court should exercise its sound discretion in denying plaintiff's plea for injunctive relief.

IV.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Plaintiff, a citizen of New Jersey, is the owner of an eight-unit apartment at 575 East 168th Street, Bronx, New York.

Magistrate Schrieber's Supplemental Report

2. In September 1963, administrative proceedings were begun in the Bronx District Rent Office of the City Rent Administration to determine whether five decontrolled apartments in plaintiff's building were subject to the provisions of the New York City Rent Eviction and Rehabilitation Law.

3. During these proceedings, plaintiff was represented by counsel and was afforded the opportunity to answer the charges and present evidence in writing.

4. On December 11, 1964, the Bronx District Rent Director held that four of the five apartments in question did not qualify for statutory decontrol and were subject to the City rent control law.

5. Thereafter, plaintiff, by his counsel, filed an administrative appeal from this decision, which was denied by an order and opinion (docket No. CPLA 9638-9641, December 15, 1965).

6. Plaintiff's counsel then sought judicial review of the Rent Administrator's final determination by Article 78 proceedings in the Supreme Court, New York County (Index No 629/1966).

7. These proceedings were decided adversley to the plaintiff by Mr. Justice Corney (New York Law Journal, April 29, 1966, p. 18 col. 1).

Magistrate Schrieber's Supplemental Report

8. Plaintiff, by his counsel, appealed this ruling to New York Appellate Division — First Department, however, the lower court ruling was affirmed without opinion on March 9, 1967 (*Davenport v. Berman*, 27 A.D. 2d 903).

9. Plaintiff's counsel, followed this denial, by instituting a class action in this Court challenging the constitutional validity of the New York City Rent Control Law (*Davenport v. Berman*, et al. 68 Civ 4984).

10. In an unpublished decision, filed July 25, 1969, Judge Cannella granted defendants' motion to dismiss the complaint. The Court also held that plaintiff's claim of a lack of due process with respect to the decontrol proceedings was without merit — the requirements of due process of law having been met by adequate proceedings and judicial review in the state court.

11. Judge Cannella's ruling was affirmed by the Second Circuit Court of Appeals (420 F.2d 294, 2d Cir. 1969).

12. On March 13, 1970, plaintiff, appearing pro se, initiated his second federal action, seeking preliminary injunctive relief enjoining the enforcement of the orders of the city rent control authorities (*Davenport v. City Rent & Rehibilitation Administration* and *Mayor John V. Lindsay*, 70 Civ 1011).

13. In an unpublished order and opinion filed May 11, 1970, Judge Tenney denied the plea for injunctive relief and dismissed the complaint. The Court found that the action was barred by the *res judicata* principle.

Magistrate Schrieber's Supplemental Report

14. Plaintiff's appeal of this order was dismissed without opinion by the Second Circuit. (Docket No. 35002 — 2d Cir. Sept. 24, 1970) and a motion for certiorari was denied by the United States Supreme Court, 401 U.S. 956, 91 Sup. Ct. 978.

15. On April 20, 1971, plaintiff, again appearing pro se, commenced his third action in this Court against the Governor of the State of New York (*Davenport v. Rockefeller*, 71 Civ. 1747).

16. This action was dismissed by an order of Judge Cannella, filed October 19, 1971. The Court held that plaintiff failed to state a claim upon which relief could be granted.

17. In May 1971, the plaintiff, in his pro se capacity, commenced his fourth federal action in this Court against John V. Lindsay, as an individual, seeking essentially the same relief as in the prior actions (71 Civ 2205).

18. On September 30, 1971, plaintiff appearing pro se instituted his fifth and last federal action to date against the Rent Commissioner, the General Counsel for the Rent Control Office and the four families occupying the re-controlled apartments in his building seeking similar relief to that sought in his four prior actions (No. 71 Civ 4263).

19. Plaintiff's motion for injunctive relief is directed to the fifth action, and should be denied.

Magistrate Schrieber's Supplemental Report

20. In view of the prior decisions of this Court and the State Courts, rejecting plaintiff's repeated claims for relief, it is highly unlikely that plaintiff can eventually succeed on the merits. Therefore, injunctive relief at this stage is not warranted.

21. Furthermore, the injury to the apartment dwellers in removing controls would be a serious one, not justified by the present facts.

22. Finally, the public interest would not be served by the granting of this extraordinary relief.

Dated: May 2, 1972

Respectfully submitted,

Sol Schreiber
U.S. Magistrate

APPENDIX D

ORDER & OPINION DENYING PROTEST

THE CITY OF NEW YORK
City Rent and Rehabilitation Administration
280 Broadway
New York 7, New York

Protest Docket Nos. CPLA 9638-9641

D.R.O. Docket Nos. 2AD 2248-51

- -X

IN THE MATTER OF THE PROTEST OF :

WILLIAM J. DAVENPORT, :

Applicant. :

- -X

ORDER AND OPINION DENYING PROTEST

On January 11, 1965 the above-named applicant-landlord filed protests against orders issued on December 11, 1964 by the District Rent and Rehabilitation Director of the Bronx District Rent Office concerning the housing accommodations known as 575 East 168th Street, Apartments 1, 2, 5 and 6, Bronx, New York.

These protests are being determined pursuant to Section 2f (11) of the Rent, Eviction and Rehabilitation Regulations.

Order and Opinion Denying Protest

The Administrator has carefully reviewed all the evidence in the record and has considered this matter de novo.

Since the housing accommodations involved in the said protests are within a single structure and since there are common questions involved, the Administrator has consolidated the said protests for disposition.

The issue in this proceeding is whether each of the four subject apartments is eligible for decontrol.

The record shows that between October 15, 1957 and March 13, 1962, the landlord filed five decontrol reports (Section 9 (11), State Rent Regulations) alleging qualifying owner-occupancy as to five of eight dwellings located in the premises as follows:

Date of Filing	Apartment No.	Report Number
Oct. 15, 1957	1	DR-3974
Jan. 6, 1959	6	DR-5420
Jan. 6, 1960	5	DR-6643
Dec. 2, 1960	2	DR-7855
Mar. 13, 1962	7	DR-9261

Reported date of inception of landlord occupancy	Reported date of subsequent renting
Oct. 6, 1955	Sept. 16, 1957
Sept. 15, 1957	Dec. 15, 1958
Dec. 16, 1958	Jan. 5, 1960
Dec. 1, 1959	Dec. 1, 1960
Jan. 1, 1961	Mar. 5, 1962

On December 11, 1964, the District Rent Director issued orders rejecting the decontrol reports (Section 2f ([11]) and establishing maximum rents for four of these apartments (Nos. 1, 2, 5 and 6).

The District Rent Director accepted decontrol as to Apartment No. 7 (DR-9261) finding that this apartment was owner-occupied by the present owner for at least one year prior to March 5, 1962 within the meaning and intent of the pertinent section of the Regulations.

The above orders were issued on the basis of a physical inspection of the subject building as well as an examination of the reported records of the Consolidated Edison Company.

The physical inspection conducted by the District Rent Director on March 20, 1964, revealed that Apartments Nos. 1, 2, and 6 were occupied for other than single family occupancy. At the

time of inspection the landlord occupied Apartment No. 3.

The utility company records (supra) show that the landlord has maintained the following accounts:

	FROM	TO
Apt. 1	10/4/55	6/6/58
Apt. 2	1/7/70	Active as of 3/26/64
Apt. 3	3/2/62	Active as of 3/26/64
Apt. 5	12/23/58	1/7/60
Apt. 6	4/1/57	1/6/59
Apt. 7	6/1/60	9/6/62

In rejecting the aforenoted reports the District Rent Director found that:

> Apartment No. 1 had been landlord-occupied for less than two years after the issuance of the certificate of eviction, (Docket No. E-7883; February 2, 1955). It is to be noted that notwithstanding the fact that an account with the Consolidated Edison Company was opened in the landlord's name on October 4, 1955 for Apartment No. 1, the record shows that in April of 1957 (approximately 17 months later) the landlord had opened an account in his name for Apartment No. 6;

Apartment No. 2 was apparently owner-occupied for less than one year. The Consolidated Edison report shows the landlord's account for this apartment was opened on January 7, 1960 and was still active on March 26, 1964 while an account in the name of the landlord had been opened for Apartment No. 7 on June 1, 1960. The period of alleged owner occupancy of Apartment 2 is from December 1959 to December 1960;

Apartment No. 5 had apparently been occupied for less than the required period because the alleged period of occupancy (December 16, 1958-January 7, 1960) clearly overlaps the inception date of occupancy for Apartment No. 2 (December 1, 1959);

Apartment No. 6 was not occupied as a single family unit at the time of the aforenoted inspection of the premises. (Overlapping periods of utility services noted above re: Apartments 1 and 5.)

In protest, the landlord alleges that he has occupied each of the subject apartments for the appropriate period of time and that the subject apartments were, at all times, rented and occupied for single family occupancy.

Specifically, the landlord maintains that the apartments which are the subject of this protest were occupied by him according to the following schedule:

	FROM	TO
Apt. 1	8/15/55	9/15/57
Apt. 2	12/1/59	12/1/60
Apt. 5	12/16/58	1/5/60
Apt. 6	9/15/57	12/15/58

The landlord further contends that rejection of decontrol reports after the passing of between five and three years (when applicable) since the initial filing of the within decontrol reports creates an undue hardship upon the landlord.

After a careful consideration of the entire evidence of record, the Administrator is of the opinion that these protests should be denied.

As the inspector's report (supra) clearly shows, three of the subject apartments (Nos. 1, 2 and 6) were at the time of inspection occupied for other than single family occupancy. Such occupancy in contravention of the Rent Regulations mandates the recontrol of these apartments regardless of other factors which may or may not be consistent with the landlord's alleged right to decontrol thereof.

Concerning Apartment No. 1 the rejection of decontrol is properly based upon the fact that the subject apartment if in fact landlord-occupied

was so occupied for a period of less than two years after the issuance of a certificate of eviction. Under the (State Section 9(11), and City) Rent Regulations decontrol based upon landlord occupancy will not attach.

As aforenoted, the landlord's evidence discloses substantial inconsistencies regarding the correlation between the landlord's alleged occupancy and the utility services rendered to the landlord.

As shown by the Consolidated Edison Company reports, the landlord could not have occupied Apartments No. 1 and 6 at the same time within the contemplation of Section 2f (11) of the Regulations.

Landlord claims to have occupied Apartment No. 2 from December 1, 1959 to December 1, 1960, while the record shows that it was only on January 7, 1960 that a utility account was opened in his name for the subject apartment.

The record shows that as far as Apartment No. 5 is concerned the landlord appears to have had possession thereof and further appears to have shown occupancy thereof for the prescribed period of time. However, the Administrator is, on the basis of this entire record, of the opinion that the landlord has not established occupancy of the nature and extent contemplated by Section 2f (11) of the Regulations as qualifying it for decontrol as will appear (infra).

The landlord has alleged that since acquiring the title to the premises in 1955 he has occupied as his permanent home and residence no less than five of the eight apartments in these premises.

The only substantial and credible evidence submitted by the landlord in support of his position is consistent less with the claim of qualifying the landlord-occupancy than with the District Rent Director's finding of occasional occupancy and use of these accommodations for the production of rental income.

The record shows that throughout the entire period of this landlord's ownership of the subject building the landlord, as a professional seaman, has spent the major portion of his time at sea; that the landlord has utilized the apartments or portions thereof as a "stopping-off" place and has not occupied or intended to occupy them as his permanent residence or home. This latter fact becomes even more apparent from a consideration of the clear indication contained in this record that the landlord during the claimed periods of alleged owner-occupancy of any one of the four subject apartments had rented space in these apartments to a roomer or roomers with whom he would share occupancy.

For example, in reply to the District Rent Director's Notice of Commencement of Proceeding to Fix Maximum Rent, the tenant George Gowins stated as follows:

> "After sharing Mr. Davenport's apartment, as a roomer, friend, and fully both in his presence and absences at sea for over a year I rented the apartment from him when he moved to another apartment in the building. I first rented Apartment No. 1, on the Ground Floor of 575 E. 168 St. We agreed in late August or early September of 1957 that I was to take the apartment when he vacated and would tenant the apartment within the terms of the Rent Control Law's definition of Single Family Occupancy. During the next 2 or 3 months until Mr. Davenport moved it was a private joke between us as to who was presently the Tenant and who the Roomer."

While it must be conceded that a merchant seaman, as many other persons whose profession or occupation requires long absences from home, is entitled to maintain a permanent home and residence, in the matter under consideration it is clear that the landlord herein did not maintain these various apartments as his permanent home. The landlord has merely attempted to use the availability of the apartments in this building in conjunction with his protracted absences from the premises as a device to create an appearance of qualifying landlord-occupancy without the intent to create the substance of such occupancy. The course pursued by the landlord cannot under all of the circumstances disclosed by the record be

permitted to achieve a result that must in the Administrator's opinion be deemed to be in circumvention and evasion of the Rent Law and Regulations.

Decontrol of an accommodation following its occupancy by a landlord essentially contemplates the enhancement of the housing rental market. The mere appearance of qualifying landlord occupancy indicating eligibility for decontrol cannot be permitted to operate as a device to wrongfully divest tenants of all of the protections of the Rent Law and Regulations or to obtain unwarranted rentals for the landlord.

To permit the result which the landlord seeks to achieve herein would be totally inconsistent with the purpose, intent and meaning of the Rent Law and Regulations generally, and of Section 2f (11) specifically.

Thus, on the basis of the entire evidence of record, the Administrator finds that this landlord's occupancy of the subject apartments does not fall within the purview, intent or definition of the owner-occupancy intended by the Regulations to provide a valid basis for decontrol.

The District Rent Director's orders are proper and should be affirmed.

Therefore, in accordance with the provisions of the City Rent and Rehabilitation Law, as amended,

and the Rent, Eviction and Rehabilitation Regulations promulgated thereunder, it is

ORDERED, that these protests be, and the same hereby are, denied, and that the District Rent Director's orders be, and the same hereby are, affirmed.

ISSUED DEC 16 1965

s/ Hortense W. Gabel
HORTENSE W. GABEL
Administrator

I hereby certify that this is a true copy of an order issued on the above date.

s/ Joseph
(Certifying Officer)

APPENDIX E

EXERPTS FROM PETITIONER'S INTERROGATORY AND RESPONDENTS' ANSWERS

The following exerpts are taken from petitioners written interrogatory in the proceedings 71 Civ 4263, and the answers and supplemental answers.

William J. Davenport as plaintiff questions,

and

Harry Michelson answers as defendant and attorney for Benjamin Altman and Daniel Joy, answers dated 24 July 1972 and supplemental answers after hearing dated 21 Sept. 1972.

Heading of Interrogatory

All of the following questions are in reference to State of New York Temporary State Housing Rent Commission dockets numbered DR-3974, DR-5420, DR-6643 and DR-7855. Which in the instant litigation plaintiff specifically charges have been contrary to the provisions of the New York State Rent Control laws of 1954 through 1961, wrongfully subjected to administrative proceedings, claims and allegations before the courts by yourself and/or your predecessors. All of which is contrary to further provisions of Title 28, Title 42 and Title 18 of the United States Codes.

All of the following questions should be answered in adequate detail or if no answer is made, it should be so stated, if possible giving the reason.

Excerpts from Petitioner's Interrogatory and Respondents' Answers

To: Benjamin Altman, individually,
Daniel Joy, individually,
Harry Michelson, individually.

Question No. 1. . . . What is your name, etc.

Question No. 2.

Are the New York State Housing Rent Commission dockets in reference which are DR-3974, DR-5420, DR-6643 and DR-7855 classifiable and/or properly classified (in your opinion) as STATUROTY EXEMPTIONS under New York State Rent Control Law as amended 1954; or are they applications for exemption under New York City Regulations known as N.Y.C. Public Law No. 20 of 1962.

Answer

Upon information and belief, the numbers DR-3974, DR-5420, DR-6643 and DR-7855, are file numbers referring to forms entitled "Landlord's Report on Statutory Decontrol," which were unadjudicated filed claims of decontrol by the plaintiff of certain housing accommodation to which the New York State Rent Control, known as the Emergency Housing Rent Control Law, was applicable prior to May 1, 1962, and on and after May 1, 1962, the New York City Rent Control Law, known as the City Rent and Rehabilitation Law, enacted as Local Law No. 20 for 1962, has been applicable to the said claims of decontrol filed under the above file numbers.

Excerpts from Petitioner's Interrogatory and Respondents' Answers

Question No. 4.

What are the dates of filing, and what date was the docket closed by the New York State Commission of the following noted dockets, and are they notices to the New York State Commission; or applications to the New York City Rent Administration.

(a,b,c,d, — the docket no's. in sequential order.)

Answer

(statement of DR No's and Filing dates only.)

Upon information and belief, no dockets were opened or closed for any of the four filed reports by the State Rent Commission; the papers filed were entitled "Landlord's Report on Statutory Decontrol" and constituted unadjudicated claims by the landlord to decontrol; the reports were filed without adjudication and subject to later evaluation and adjudication of the truth of the statements contained in the reports.

Question No. 5.

Do applications for decontrol of the apartments involved in the noted docket numbers exist? If so please note their docket numbers and whereabouts.

Answer

Excerpts from Petitioner's Interrogatory and Respondents' Answers

Upon information and belief, in 1963 upon the iniative of the District Rent Director of the New York City Rent and Rehabilitation Administration, the said landlord's Reports of Statutory Decontrol were treated as applications for decontrol and for that purpose the District Rent Director opened fact finding proceedings to which he was assigned docket numbers 2AD 2248-2252 to investigate what appeared to be inconsistent claims made by the plaintiff-landlord and to determination after notice to the plaintiff-landlord the validity of his claims of decontrol. The files are presently in the control of the New York City Office of Rent Control.

Question No. 7.

Has the New York City Rent Administrator, or the New York State Rent Commission charged any fraud to exist in the landlord's sworn and filed notices of the above dockets, (b) if so, is it alleged to be intentional or accidental, and what statements are involved?

Question No. 8.

Who made the above charge?

Answer to No. 7.

Upon information and belief, no criminal charges were filed, but administrative determinations were based in substantial part upon findings in substance of lack o

credibility of the plaintiff-landlord's conflicting claims made in separate reports of decontrol.

Ans to No. 8. — is "See answer to interr. No. 7.

Supplemental Answer to No. 7 (after magistrate hearing and order to answer)

Upon information and belief, the landlord, William J. Davenport, was notified by the mailing of notices to his attorney, Marshall H. Kozinn, Esq., dated March 3, 1964 and July 27, 1964, of the reasons for the proposed administrative determinations that certain apartments, previously claimed by Davenport to be decontrolled, did not factually satisfy the legal requirements for decontrol. The notices, of which copies are attached as Exhibits 1 through 10, offered Mr. William J. Davenport opportunities, through his attorney, to submit evidence in his own behalf and in opposition to the evidence in the record summarized in the notices.

Upon information and belief, the administrative proceedings under docket numbers 2AD 2248-2252 were commenced upon the personal initiative of the District Rent Director of the Bronx District Rent Office of the New York City Rent and Rehabilitation Administration, between approximately July, 1963 and September, 1963, and preliminary investigation was begun about September, 1963, by examining and comparing the statements made by William J. Davenport in the various claims filed by him for decontrol of five separate apartments in premises 575 East 168th Street, Bronx, New York.

Excerpts from Petitioner's Interrogatory and Respondents' Answers

Question No. 9.

Has any NOTICE of such CHARGES, or any opportunity to reply in his own defense been provided landlord-plaintiff, where evidence and witnesses were exhibited and examined under oath with powers of subpoena provided the landlord either by the New York City Rent Administrator or the courts to determine the FACTS, if so by whom on what date? (a) (b)

Answer

Upon information and belief, landlord-plaintiff was fully notified of the administrative proceedings, and was actually represented by attorneys at the two levels of administrative proceedings, and the two further levels of judicial proceedings, and the landlord-plaintiff was entitled in the two levels of administrative proceedings to rebut all adverse date in the record, and plaintiff-landlord did submit for consideration all the data and arguments he had to offer through his attorneys.

Supplemental Answer

Upon information and belief:

(a) Notice of charges was given to William J. Davenport in various ways including the notices dated March 3, 1964 and July 27, 1964 referred to in and annexed as

part of the supplemental answer to Interrogatory No. 7., which notices were sent to an attorney representing Mr. Davenport.

(b) The said notices dated March 3, 1964 and July 27, 1964 explicitly offered an opportunity to submit evidence on behalf of Mr. Davenport's position.

(c) The proceedings under Docket No. 2AD 2248-2252 were adversary in nature, as were all such proceedings before the New York City Rent and Rehabilitation Administration, pursuant to the Rent Control Law and Regulations.

(d) Specific notice of all evidence considered in the proceedings under Docket No. 2AD 2248-2252 was made available to the landlord Davenport, by the mailing of copies of adverse data to his attorney with an opportunity to answer and rebut, and constructive notice was also given by the general availability of the file for inspection by his attorney during the pendency of the proceedings before the District Rent Office and thereafter for preparation of a protest appeal and during the pendency of the administrative protest appeal to review the District Rent Director's determination.

(e) No oral hearing was held but the landlord was given an opportunity to be heard in the sense that he was entitled to be aware of, and was constructively aware of, all the adverse data in the record and was entitled to challenge any such adverse data. The landlord

Excerpts from Petitioner's Interrogatory and Respondents' Answers

Davenport, on several occasions through his attorney, submitted data in his own behalf. In a letter dated November 18, 1964 from Mr. Davenport's attorney, the attorney stated that Mr. Davenport had no further or additional evidence to submit. A copy of the said letter dated November 18, 1964 is annexed hereto as Exhibit 11.

(Petitioner's comment here interjected — THERE IS NO SUCH LETTER OR COMMENT.)

(f) The Rent Control Law authorizes the Rent Administrator in discretion to subpoena witnesses and documents, but the record shows no request was ever made for subpoenas on behalf of Mr. Davenport.

(g) Oral hearings were requested by the attorney for Mr. Davenport. Under the rent control regulations, oral hearings may be held in the discretion of the rent control officials when necessary but oral hearings were denied in this case as unnecessary in the circumstances of the case. Mr. Davenport, through his attorneys, continued to assert as error the refusal to afford him an oral hearing, and his contentions were rejected in an administrative appeal, as well as in judicial proceedings brought by Mr. Davenport through various attorneys in both Special Term of the New York Supreme Court and in the Appellate Division.

(i) The determinations made by the District Rent Director denying decontrol were based solely upon papers contained in the file of Docket No. 2AD

2248-2252, and the determination of the protests by Mr. Davenport was based solely on the papers contained in Docket Nos. 2AD 2248-52 and CPLA 9638-9641. The rationale of the protest determinations is set forth in detail in an order and opinion dated December 16, 1965, a copy of which is annexed as Exhibit 12.

(Note: this document not included here is on file in the Court — as Appendix A, of petition for writ of certiorari Oct. 1970 No. 1149.)

(k) The entire contents of the file of docket 2AD 2248-52 is also known personally to the plaintiff-landlord William Davenport, and Mr. Davenport presumably has a complete copy of the entire file which he obtained by a subpoena duces tecum in an unrelated action before U.S. District Court, Judge Motley in approximately August, 1971 and which file he again examined in the presence of U.S. Magistrate Schrieber in about October 1971, under which last occasion your deponent personally delivered to Mr. Davenport copies of each of the papers in the said file which Mr. Davenport requested to be copied for him.

Question No. 10.

Has a charge of fraud by plaintiff as stated in question No. 7 been submitted to the courts as provided by the subject Rent Control Laws of the State of New York of 1961 and 1962 as follows:

Excerpts from Petitioner's Interrogatory and Respondents' Answers

"Whenever in the judgment of the commission any person has engaged in or is about to engage in any acts or practices which constitute or will constitute a violation of any provisions of Section ten of this act, the commission may make application to the Supreme Court for an order enjoining such acts or practices or for an order enforcing compliance with such provision. . . . . Whenever the commission has reason to believe that any person is liable to punishment under this subdivision, the commission may certify the facts to the district attorney of any county having jurisdiction of the alleged violation . . . ."

Answer Upon information and belief, no criminal charges were filed.

No supplemental answer. (The above answer being incomplete, there is no answer).

Question No. 11.

Has any proof been exhibited, examined or subjected to trial that plaintiff-landlord did not in fact have occupancy as provided by law of the involved apartments for the entire period which he has claimed? If so specify what and when examined, and how examined.

Answer

Upon information and belief, in District Rent Office administrative proceedings, under docket numbers

Excerpts from Petitioner's Interrogatory and Respondents' Answers

2AD 2248-2AD 2252, and further administrative protest proceedings, under docket number CPLA 9658-9641, there was documentary evidence and other data of which plaintiff's attorneys had notice, in which proceedings he was represented by attorneys, and in which proceedings he had an opportunity through his attorneys to rebut adverse data in the record.

Supplemental answer

Upon information and belief, all of the data and evidence upon which the District Rent Director and the City Rent Administrator relied is contained in the files of Docket Nos. 2AD 2248-2252 and CPLA 9658-9641; that the determinations made were based upon considerations of the entire record; and that the original record before the District Rent Director consists of over 200 pages, approximately one-half of which contain data material to the District Rent Director's determination.

(Note — 9658-9641 is respondent's error, should be 9638-1941)

Question No. 12.

In reference to the involved dockets, has the claim or charge been made that plaintiff-landlord rented the subject apartments for other than single family occupancy by any Rent Administrator in any official paper or document? If so specify what paper or document and where stated.

Excerpts from Petitioner's Interrogatory and Respondents' Answers

Answer

Upon information and belief, based upon an incomplete study of relevant records, no claim was made that plaintiff-landlord rented any apartment for other than single family occupancy although on official inspection, several apartments were found to be occupied for other than single family occupancy.

Question No. 14.

Is the landlord-plaintiff lawfully responsible for acts and unlawful occupancy by tenants? If so state the specification of law.

Answer

In general, in some respects, a landlord may be responsible for unlawful occupancy by his tenants. However, no specific answer to this question is possible because the question is too broad and vague for a responsible answer.

Question No. 17.

Did the New York City Rent Administrator revoke the prior statutory exemptions of the subject dockets or deny applications to him which were enclosed in those dockets? (b) In either instance specify the year and section or provision of law applicable and governing the administrative action.

Excerpts from Petitioner's Interrogatory and Respondents' Answers

Answer

Upon information and belief, the New York City Rent Administrator adjudicated that certain of the landlord's claims of decontrol were invalid and that the landlord was not entitled to decontrol as to certain apartments. Action was taken in administrative proceedings bearing docket numbers 2AD 2248-2251, which were commenced in 1963 and concluded at the level of the District Rent Director by orders and determinations issued on or about December 11, 1964, and such actions were taken pursuant to City Rent Regulations Section 2f(11), and Section 36 and the corresponding statutory provisions, and were thereafter affirmed by the City Rent and Rehabilitation Administrator upon the plaintiff's protest appeal under Docket No. CPLA 9638-9641.

Question No. 19.

Has the New York City Rent Administrator's orders relative to dockets DR-3774 and DR 5420 effectively established grounds by which the landlord-plaintiff in this action should legally be held responsible in further actions at law to the tenants for triple damages for overcharges of rents, as a consequence of infraction by the tenants on the occupancy contract and requirements of law which in fact constitute an injury to the landlord-plaintiff? Explain.

Excerpts from Petitioner's Interrogatory and Respondents' Answers

Answer

I do not know the answer to this question and I therefore express no opinion.

APPENDIX F

ADMINISTRATIVE PROGRESS SHEET

The administrative "appellate" level review of administrative appeal dockets CPLA 9638-9641 as recorded on the official sheet — exhibit "R" with complaint.

Protest Attorney KANAREK
Senior Attorney Duerehne (?)

PROGRESS SHEET

1. Date of assignment of Protest by Senior Attorney
   5/15/65

2. Date of review of record by Protest Attorney

3. Date and nature of first action taken

(For example, notice of conference mailed, inspection request of DRO, etc.)

Administrative Progress Sheet

4. Date of conference, if any, and duration thereof

_____

5. Date of submission of final order to Senior Attorney

_____

6. Date of mailing of final order
12/16/65

_____

(This information furnished by Docket Section)

* * * * * *

MAILING OF COPIES OF ORDERS. If either party appears by attorney envelopes should be addressed to the party, c/o his attorney at attorney's office address. The attorney who appears on the protest, where there has been a change of attorneys, is the proper one to be notified. Prepare envelopes for:

_____ _____

_____ _____

_____ _____

_____ _____

APPENDIX G

Judgement - Docket 73-2383

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of March one thousand nine hundred and seventy-four.

Present:

Hon. IRVING R. KAUFMAN, Chief Judge.

Hon. WILFRED FEINBERG

Hon. WILLIAM H. MULLIGAN

Circuit Judges

William J. Davenport
Plaintiff-Appellant

v.

Benjamin Altman, Commissioner of the N.Y.C. Rent Control Agency, Daniel W. Joy and Harry Michelson, General Counsel of the N.Y.C. Rent Control Agency, et. al.,
Defemdamts -Appellees.

Appeal from the United States District Court for the Southern District of New Y

This cause came to be heard on the transcript of record from the United Stat

Judgement

District Court for the Southern District of New York, and was argued by counsel for appellee and by appellant pro se.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgement of said District Court be and it hereby is affirmed.

Irving R. Kaufman

Wilfred Feinberg

William A. Mulligan.